SUPREME COURT OF THE UNITED STATES

NO. 119, ORIGINAL

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

MOTION OF THE MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY FOR LEAVE TO PARTICIPATE AS AN AMICUS CURIAE IN THE PRESENT ACTION.

Nicholas J. Scobbo, Jr.
Mitchell J. Sikora, Jr.
FERRITER, SCOBBO, SIKORA, CARUSO & RODOPHELE, P.C.
One Beacon Street
Boston, MA 02108
Tel: 617-589-0700
Fax: 617-589-0701

MOTION.

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") respectfully moves that the court grant it leave to participate as an amicus curiae in the present action.

GROUNDS.

Guided by the criteria of Supreme Court Rule 37 controlling participation by an appellate amicus curiae, MMWEC reports as follows.

1. (a) MMWEC is a statutorily created corporation comprised of 29 Massachusetts municipal electric departments and intended by the Massachusetts Legislature to acquire and to sell to its constituent members and other utilities electrical power at economical rates. To that end, the Legislature has authorized and enabled MMWEC to purchase electrical power and generating capacity in greater volumes and at lower costs than would be available to individual municipal electric departments; and to sell those amounts of "public power" to its members and to other utility purchasers at savings resulting from the scale of its activities.

(b) In legal character, MMWEC comprises a political subdivision of the Commonwealth created by Massachusetts Statutes 1975, Chapter 775, §§1-25, codified as Massachusetts General Laws Chapter 164, Appendix §§1-1 through 1-25 (hereinafter M.G.L. c. 164, App. §__). That enabling legislation provides that MMWEC's authority be "deemed and held to be in the performance of an essential public function." M.G.L. c. 164, §1-2. As "a public instrumentality," MMWEC is empowered to "acquire, construct, operate or otherwise participate in electric power facilities to meet the power requirements of its members." M.G.L. c. 164, §1-5(p); MMWEC may contract with non-member utility companies located inside or outside of Massachusetts. M.G.L. c. 164, App. §1-5(m).

(c) Because MMWEC has no stockholders, no retained earnings, and no independent source of funds, it borrows money in order to finance its acquisition or construction of electric facilities. When members and/or other contracting utilities express sufficient interest in a particular electric power source or facility, MMWEC creates a planning, acquisition, and financing vehicle knowns as a "project." To finance a project, MMWEC borrows needed funds through long-term revenue bonds or other forms of indebtedness M.G.L. c. 164, App. §1-9. It may issue such long-term bonds only if the Massachusetts Department of Public Utilities ("DPU"), after an adjudicatory hearing, determines such an issuance to be "reasonably necessary for the proposed purpose" and only upon such terms and conditions as the DPU may impose. M.G.L. c. 164, App. §1-17.

(d) As a result of initial DPU authorization of financing in 1976, 1977, 1980, and 1981, and contractual arrangements undertaken during the period of 1976 - 1982, MMWEC has purchased and presently maintains ownership of 11.59% (133,324 KW) of the capacity and output of the Seabrook Station. Under various power sales agreements, it sells that output to 28 Massachusetts participants, and one Rhode Island participant.

2. (a) As a joint owner of the Seabrook Station, MMWEC to date has made payments of the New Hampshire Nuclear Station Property Tax as follows:

Date	Amount
September 13, 1991	$ 649,230.40
December 15, 1991	649,230.40
April 10, 1992	649,230.40
Total	$1,947,691.20

(b) MMWEC does not engage in any business activity in New Hampshire within the meaning of that state's Business Profits Tax. Consequently it has not, and does not, pay any amounts under the statute. It has not, and does not, qualify for any credit or set-off under that tax.

(c) As mandated by its enabling legislation, M.G.L. c. 164, App. §1-6(b), (c), and by its power sales agreements, MMWEC has transmitted the Nuclear Station Property Tax onward to its project participants, which bill the tax expense to their customers (retail level consumers of business and residential

character), in the following manner. Since November, 1991, MMWEC has billed the tax increment monthly, under an annual budget as a level amount to each power sales agreement project participant contracting with MMWEC for the output of Seabrook Station capacity. The charges from MMWEC to its project participants are not subject to any rate regulation. M.G.L. c. 164, §1-10(b). The Massachusetts participants recognize the billings as a purchase power expense so as to be able to recover the expense from their customers. Those recoveries create revenues for repayment to MMWEC.

3. Presently MMWEC is participating in the preparation of the case before the Special Master as a source of information and evidence accrued from its role as a substantial joint owner of the Seabrook Station (Complaint, paragraph 7).

4. Its interests align generally with those of the Commonwealth of Massachusetts, but contain several independent and distinctive features.

(a) Its transmission of the New Hampshire tax burden directly to its municipal light department members, other contracting municipal light departments, and consumers, burdens those entities with whom it is in a relationship of ongoing business privity practicably closer and more immediate than those entities' parens patriae relationship with the Commonwealth. Individually, those entities lack the resources to challenge the

New Hampshire tax burden in these proceedings. MMWEC is able to participate, and is situated and motivated to protect the interests of those municipal light departments and those consumers to whom it reluctantly transmits the cost of the tax. In traditional terms it would have direct standing to assert the injury of the tax to itself and to its members, NAACP v. Button, 371 U.S. 415, 428 (1963); and jus tertii standing to assert the interests of its absent contracting purchasers and consumers. See generally Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Barrows v. Jackson, 346 U.S. 249, 255-258 (1953); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); R.A. Sedler, Standing to Aseert Constitutional Jus Tertii in the Supreme Court, 71 YALE L.J. 599, 652-656 (1962); and NOTE, Standing to Assert Constitutional Jus Tertii, 88 HARV. L. REV. 423, 431-436 (1974).

(b) While the parens patriae standing of the Commonwealth appears to rest on firm grounds, Wyoming v. Oklahoma, 60 USLW 4119, 4123-4124 (1992), and Maryland v. Louisiana, 451 U.S. 725, 735-739 (1981), three dissenting Justices in the Wyoming case expressed the view that a state, claiming parens patriae standing in behalf of injured resident clients at the hands of absent third parties, must eliminate alternate or "variable" causes of the clients' injury so as to demonstrate that their harm flows reasonably directly or "traceab[ly]" from the challenged conduct of the defendant state. 60 USLW at 4127 (dissenting Opinion of Justice Scalia, joined by the Chief Justice and Justice Thomas).

(i) As an indicated "third party" in the causal chain of injury reaching the ultimate, but absent, ratepayer-taxpayer, MMWEC wishes to furnish information, evidence, and argument upon the course and effects of the tax.

(ii) In the same role, MMWEC wishes to corroborate the parens patriae standing of the Commonwealth against any doubts generated by the cited Wyoming dissenters' analysis.

5. MMWEC's participation will be efficient and unobtrusive. It has monitored all papers and proceedings to date and reflected carefully upon its proposed participation. It is familiar with the status and agenda of the case. It will conform its involvement to the existing plans of the Special Master.

CONCLUSION.

Therefore the Massachusetts Mutual Wholesale Electric Company requests the allowance of its Motion to Participate as an Amicus Curiae.

Respectfully submitted,

Nicholas J. Scobbo, Jr. (ns)
Mitchell J. Sikora, Jr.

Nicholas J. Scobbo, Jr.
Mitchell J. Sikora, Jr.
FERRITER, SCOBBO, SIKORA, CARUSO & RODOPHELE, P.C.
One Beacon Street
Boston, MA 02108
(617) 589-0700

Dated: June 10, 1992.

CERTIFICATE OF SERVICE

I, Mitchell J. Sikora, Jr., an attorney for the proposed amicus curiae Massachusetts Municipal Wholesale Electric Company, hereby certify that I have today undertaken service of that client's Motion for Leave to Participate as Amicus Curiae by means of hand delivery or first class mailing of copies of the same to all counsel of record and to the clerk for Special Master Vincent L. McKusick.

Mitchell J. Sikora, Jr.

Dated: June 12, 1992.